HANG CHIANG HWA

v.

TONG CHANG FOOK

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[BANKRUPTCY NO: 29-29-2001]
14 NOVEMBER 2002

CIVIL PROCEDURE: *Appeal - Appeal from registrar - Registrar dismissed application to set aside bankruptcy notice - Bankruptcy notice based on decision from Sessions Court - Appeal against said decision dismissed by another High Court - Whether present appeal a challenge against High Court's decision - Absence of application to set aside decision - Failure to appeal further against High Court's decision - Whether decision rendered final and conclusive - Collateral proceedings - Whether open to judgment debtor to challenge decision - Stay of proceedings - Absence of application to stay High Court decision - Absence of allegation of counterclaim, set-off or cross-demand - Whether present appeal to be granted*

The judgment creditor ('JC') had obtained a judgment ('the said judgment') from the Sessions Court against the judgment debtor ('JD'). The JD's appeal to the High Court against the said judgment was dismissed. Pursuant to the said judgment, a bankruptcy notice was sent to the JD. The JD applied to the deputy registrar to set aside the bankruptcy notice, contending that the said judgment which formed the basis of the said notice was void *ab initio*, invalid and a nullity as it was beyond the jurisdiction of the Sessions Court. In the alternative, the JD sought for a stay of the bankruptcy notice until the court decides upon the validity of the said judgment. The registrar dismissed the JD's application. Hence, this appeal.

The issue before this court was whether the JD could challenge the validity of the said judgment in seeking an order to set aside the bankruptcy notice when another High Court had dismissed the JD's appeal against the said judgment.

Held:

[1] As stated in the Federal Court case of *Badiaddin*, where an order or judgment is challenged, then it is to be impugned in the proceedings brought for that purpose. Here, the JD had not forwarded an application

to set aside the said judgment which was alleged to be irregular. The JD had also omitted to appeal further after the High Court had struck off his appeal. The said judgment was now final and conclusive. (p 151 d-g)

[2] The procedure for attacking a judgment by way of collateral proceedings was expounded in the Federal Court case of *Eu Finance* and subsequently by the High Court in *Morgan Guaranty Trust*. However, the JD could not rely upon those cases as the facts in the present case actually denote an exception to the principle stated therein. The JD had actually exhausted the statutory right of appeal and that appeal had been struck off by the High Court. Allowing the JD to do so would tantamount to permitting the JD to have a second bite at the proverbial cherry. (pp 151 i & 152 a-c)

[3] The JD's failure to apply for a stay of the said judgment presented another fundamental flaw in the present appeal. It was unmeritorious to apply for a stay of the bankruptcy proceedings instead when the said judgment had been concretised as final and conclusive. (p 152 d)

[4] There was no allegation of fact from the JD regarding a counterclaim, set-off or cross demand which equalled or exceeded the amount of judgment debt for the court to consider. Neither was there any indication that the bankruptcy notice required the JD to pay a judgment sum which was contrary to the terms of judgment. (p 152 e-f)

[Judgment debtor's appeal dismissed with costs.]

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 ***(refd)***

Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd [1996] 1 CLJ 444 ***(refd)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 2 MLJ 37 ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 ***(refd)***

Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn Bhd [1989] 1 CLJ 452; [1989] 2 CLJ (Rep) 133 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Tuan Hj Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd [1996] 1 CLJ 241 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 91
Bankruptcy Rules 1969, rr. 95, 98
Courts of Judicature Act 1964, s. 69(e)
Rules of the High Court 1980, O. 56 r. 1

Other source(s) referred to:
Malaysian High Court Practice, 1998 Desk Edn MLJ, p 3803

For the judgment debtor - Ravinathan Muthiah; M/s Ravi Muthiah & Co
For the judgment creditor - Yau Jiok Hua; M/s Yau Jiok Hua & Co

Reported by M Maheswaran

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant judgment-debtor ("the judgment-debtor") against the decision of the learned deputy registrar ("the registrar") who had on 6 June 2001 dismissed the judgment-debtor's application in encl. (4) with costs.

Enclosure (4) was filed by the judgment-debtor under rr. 95 and 98 of the Bankruptcy Rules 1969, s. 91 of the Bankruptcy Act 1967 and the inherent jurisdiction of the court for an order, *inter alia*, that the bankruptcy notice in the action herein served on the judgment-debtor on 14 February 2001 ("the bankruptcy notice") be struck out and/or set aside on the ground that the judgment dated 26 June 2000 in Melaka Sessions Court Summons No. 52-766-1999 which formed the basis of this bankruptcy notice ("the judgment") was void *ab initio*, invalid and a nullity; or alternatively, the bankruptcy notice be stayed until such time as determined by the court or until a decision of the court is obtained regarding the validity and effect of the judgment.

Facts Of The Case

The judgment-creditor was the plaintiff and the judgment-debtor the defendant in the Melaka Sessions Court Summons No. 57-766-1999 wherein the plaintiff has obtained judgment against the defendant, which judgment formed the basis of the bankruptcy notice.

These are the simple and straightforward facts averred to by the judgment-debtor in his affidavit in support, which also alleged that the judgment has been obtained pursuant to the enforcement of a trust, allegedly beyond the jurisdiction of the Sessions Court, thereby rendering the judgment void *ab initio*, invalid and a nullity.

The judgment-debtor's learned counsel confirmed from the Bar table that the appeal lodged by the judgment-debtor against the judgment has been struck out by the High Court *vide* Melaka High Court Civil Appeal No. 12-33-2000.

Question Of Law For Decision

In essence, this appeal raises a fundamental question of law for determination by the court, as the facts are not disputed. This question may be formulated as follows:

> In bankruptcy proceedings, where a bankruptcy notice has been issued by a judgment-creditor against a judgment-debtor on the basis of a judgment obtained in a sessions court by the judgment-creditor against the judgment-debtor and an appeal against the judgment has been struck out by a Judge of the High Court, is it open to the judgment-debtor to challenge the validity of the judgment in another High Court for the purpose of obtaining an order to strike out or set aside the bankruptcy notice?

Submission For Judgment-Debtor

Encik Ravi Muthiah, learned counsel for the judgment-debtor, repeated the view that the judgment is void as it was allegedly given pursuant to an enforcement of trust under s. 69(e) of the Courts of Judicature Act 1964 and is beyond the jurisdiction of the sessions court, and that no bankruptcy notice can be issued on the basis thereof. He added that the judgment was also not a final judgment.

Contention For Judgment-Creditor

For the judgment-creditor, learned counsel En. Yau Jiok Hua submitted that the judgment-debtor, having chosen not to make an application to set aside the judgment, is bound by it as it is a final judgment of the sessions court and execution thereon has not been stayed; neither was there any counterclaim, set off or cross demand which equals or exceeds the judgment sum. It was argued that the alternative prayer for a stay of the bankruptcy notice should also be dismissed.

Decision Of The Court

Appeal By Way Of Rehearing

Since this appeal under O. 56 r. 1 of the Rules of the High Court 1980 proceeds by way of a rehearing, I shall treat it as if it were being heard for

the first time: *Chin Kon Nam & Anor v. Chai Yun Phin Development Sdn Bhd* [1996] 1 CLJ 144; *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716; *Tuan Haji Ahmed Abdul Rahman v. Arab-Malaysian Finance Bhd* [1996] 1 CLJ 241, quoted in *Malaysian High Court Practice* 1998 Desk Edn. MLJ p. 3803.

Challenge To Judgment

In respect of the judgment-debtor's challenge that the judgment is void, learned counsel placed reliance on *Badiaddin bin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75. In that case, the Federal Court held, *inter alia*, that where an order of the court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being shown, to grant a declaration to the effect that the order is invalid and to have it set aside (per Gopal Sri Ram JCA).

The operative words which spell out the procedure for the purpose of challenging an order or judgment are specific ie, it is to be impugned in proceedings brought for that purpose, and there was such an application in *Badiaddin* to set aside the impugned order on ground of nullity. On the other hand, the judgment-debtor herein has not followed this specific procedure ie, to make an application to set aside the judgment in proceedings brought for that purpose.

Hence, the judgment alleged by the judgment-debtor to be irregular without making an application to set aside the judgment in proceedings brought for that purpose is in my view valid and enforceable, as a result of which it cannot be ignored or disobeyed.

Further, the judgment-debtor's appeal *vide* Melaka High Court Civil Appeal No. 12-33-2000 against the judgment came up for hearing in the High Court on 29 November 2000 but the absence of the judgment-debtor's learned counsel has resulted in that appeal being struck out. There is no further appeal or proceeding taken by the judgment-debtor against the decision of the High Court striking out the judgment-debtor's appeal, in which case, I am of the view that the judgment is now final and conclusive.

Collateral Procedings

In submitting that the judgment is capable of being challenged by way of collateral proceedings herein, learned counsel for the judgment-debtor cited the Federal Court decision in *Eu Finance Berhad v. Lim Yoke Foo* [1982] 2 MLJ 37 and the High Court decision in *Morgan Guaranty Trust Company of New York v. Lian Seng Properties Sdn Bhd* [1989] 1 CLJ 452; [1989] 2 CLJ (Rep) 133. In both these decisions, the procedure for attacking a judgment by way

of collateral proceedings had been expounded as a general rule. The Federal Court and the High Court have respectively declared a second order for sale under the National Land Code 1965 in *Eu Finance* and a judgment entered independently of the Rules of the High Court 1980 in *Morgan Guaranty* to be null and void.

In my judgment, the facts of the instant appeal show that the judgment-debtor has actually exhausted the statutory right of appeal and that appeal has eventually been struck out by the High Court. I am of the view that the facts herein constitute an exception to the general rule as enunciated in *Eu Finance, supra,* and that the judgment-debtor cannot now challenge the judgment by way of collateral proceedings, because to do so would allow the judgment-debtor to have a second bite at the proverbial cherry.

No Stay Of Execution Of Judgment

Another fundamentally significant issue is that the judgment-debtor has made no attempt whatsoever to apply for an order to stay execution of the judgment, but has instead chosen to ask for a stay of the bankruptcy proceedings herein. In my view, the application to stay the bankruptcy proceeding is unmeritorious as the judgment has now been concretised as final and conclusive.

No Counterclaim, Set-Off Or Cross Demand

The judgment debtor's affidavit in support also did not contain any allegation of fact that the judgment-debtor has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt for consideration by the court. Neither has the judgment-debtor shown that he was required by the bankruptcy notice to pay a judgment sum which is not in accordance with the terms of the judgment: *J Raju a/l M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 CA.

Conclusion

On the foregoing grounds, I hold that the registrar has arrived at the correct decision in dismissing the judgment-debtor's application in encl. (4) and that decision is hereby affirmed. In the circumstances, the answer to the above question for determination is in the negative. The judgment-debtor's appeal is hereby dismissed with costs.